STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

DANE RICHARD KRUKOWSKI

Defendant-Appellee.
_____/

Supreme Court No. 160263

Court of Appeals No. 334320

Lower Court No. 15-41274 FH

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_____

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SUPPLEMENTAL BRIEF

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Statement of Jurisdiction

Dane Richard Krukowski adapts and incorporates his Statement of Jurisdiction from his Answer to Plaintiff-Appellant's Application For Leave To Appeal.

Supplemental Statement of Question Presented

I. Is there insufficient evidence that Mr. Krukowski committed second-degree child abuse?

Court of Appeals answers, "Yes."

Dane Richard Krukowski answers, "Yes."

Supplemental Statement of Facts

Codie Stevens and Dane Krukowski were convicted of second-degree child abuse and sentenced to prison for failing to immediately take their infant son to the doctor after an accidental fall in the bathtub. They chose, based on their parenting experience, to watch their son and treat him by putting a cold compress on his head. He was seen by a doctor two days after the fall. One day after their son started vomiting, and immediately upon noticing seizure-like activity, Ms. Stevens and Mr. Krukowski took him to the emergency room. The prosecutor criminalized their initial decision not to seek immediate medical assistance. Now on appeal, the prosecution attempts to recast the initial failure as affirmative acts in order to save these convictions.

RK's Health Issues Prior to the Fall

RK was born December 6, 2014 to parents Codie Stevens and Dane Krukowski. (App 168a [34]). Ms. Stevens worked at a pharmacy and Mr. Krukowski worked at a bar and grill as a cook, bouncer, and bartender. (App 178a [74]). Because the couple's first child was delivered by cesarean section, RK was also scheduled to be delivered by C-section; Ms. Stevens went into labor almost two weeks early. (App 196a [147]). The delivery was a difficult one. Ms. Stevens endured near constant vomiting during labor. (App 168a [35]). Rather than take her immediately for a C-section, the procedure was repeatedly delayed while other patients went first. (App 168a [36]). Ultimately Ms. Stevens labored for 19 hours. (App 168a [34]).

When Ms. Stevens was finally able to hold RK, he was bruised from forehead to mid-chest. (App 169a [38]). When RK's grandmother, Shawn Stevens, first saw him, she noticed the bruising and that "[h]is head was huge. . . . His head was very big." (App 117a-118a [236-237, 239]). Shawn Stevens asked hospital staff to x-ray RK because she was concerned about the bruising and enlarged head, but staff ignored her. (App 118a [240]).

RK could not hold down formula or breastmilk. (App 169a [38]). Ms. Stevens and Mr. Krukowski tried several types of formula before they found one he seemed to tolerate. (App 169a [39]). They were discharged from the hospital and went to see pediatrician Dr. Dawis two days later. (App 169a [39]).

Ms. Stevens told Dr. Dawis that RK was not keeping his formula down and that he was generally unhappy. (App 169a [40]). RK often cried with great distress and could only be comforted for short periods. (App 169a [40-41]). He continued to vomit. (App 169a [41]). Dr. Dawis remarked RK was a bit jaundiced, but only suggested he should get sunlight and plenty to eat. (App 170a [44]). Dr. Dawis concluded RK was a "well baby" in all respects, including his head. (App 64a [21]). A return visit was scheduled for February 9, 2015. (App 170a [45]). Between the visits, RK became less fussy and "not too overbearing," by Ms. Stevens' account. (App 170a [45]).

Accidental Fall in Bathtub

February 7 was a Saturday and Ms. Stevens was home with Mr. Krukowski, RK, and the couple's older child, Ella. (App 171a [49]). Mr. Krukowski often bathed

RK and he decided to do so that day. (App 200a [162]). While Mr. Krukowski was taking him out of the tub, RK jerked, slipped from Mr. Krukowski's grasp, and fell. (App 172a, 200a [50, 165]). RK hit his head, fell into the water, and Mr. Krukowski scooped him out and called to Ms. Stevens. (App 201a 166). Ms. Stevens dried him, dressed him, and checked him over. (App 172a [50]). Ms. Stevens checked to see if RK's eyes would follow her finger, and they did. (App 172a, 202a [50, 172]). She checked to see if RK would grasp her finger, and he did. (App 172a, 202a [50, 172]). She also checked his feet for reaction, and he responded. (App 172a, 202a [50, 172]).

Ms. Stevens noticed "slight swelling, and then a – I think it was like a tiny little dot, and it was, like, yellow. It wasn't like, black or blue" on RK's head (App 172a [51]). Mr. Krukowski thought "it just looked a little red from where, you know, I had dropped him." (App 201a [168]). Mr. Krukowski said a "dime-sized" bruise eventually appeared. (App 202a [170]). Shawn Stevens, RK's grandmother, saw RK that day and said he had a "dime-sized bump," with only a slight shadowing in terms of discoloration. (App 114a [221]). Shawn Stevens advised the couple she would take RK to be seen by a doctor but did not specify that it should be done immediately. (App 114a [222]). She went on, "I suggested to [Codie Stevens]. But to me, you know, to be safe than sorry; not that I felt he was in danger, because the bump on his head was not hardly there. It was so miniscule. Parental discretion." (App 147a [102-103]). They wrapped a small bag of frozen peas in a towel and put it on RK's head. (App 178a [75]).

By the next day, RK was awake and smiling. (App 172a [52]). There was nothing abnormal about his breathing or behavior. (App 178a [76]). He ate regularly (App 178a [76]). Mr. Krukowski set up a little nest of blankets and stuffed animals, where RK and his sister Ella cuddled and watched cartoons. (App 172a [52]).

On Monday, February 9, Ms. Stevens took RK back to the pediatrician for the regularly-scheduled follow-up visit. (App 172a [52]). Ms. Stevens informed the doctor that RK was still somewhat fussy but was better about keeping formula down; she also described the tub fall.[1] (App 172a [53]). Dr. Dawis recommended taking RK to a chiropractor; Ms. Stevens was skeptical but made an appointment for that day. (App 172a-173a [53-55]).

RK had appointments with a chiropractor on February 9, 10, and 18. (App 171a [48-49]). On February 9, Dr. Dense saw RK. (App 173a [55]). No x-rays were taken, but Dr. Dense put RK between his legs and adjusted his neck. (App 173a [55]). Ms. Stevens reported a cracking sound, like when a person cracks their fingers. (App 173a [55]). Dr. Dense then hung RK upside down and "twisted," and "proceeded to lay him on the medical bed, and his neck went from left to right and it cracked." (App 173a [56]; App 89a [122]). Ms. Stevens brought RK back the next day and he was seen by Dr. Barrigar. (App 173a [57]). Dr. Barrigar did the same things, cracking RK's neck and hanging him upside down. App 173a [57]; App 98a [159]). Ms. Stevens was still skeptical, but she said "I didn't say anything. Putting my trust into a doctor." (App 173a [57]). Ms. Stevens brought RK back to see Dr. Barrigar on February 18 and the

[1] Dr. Dawis denied being informed of the tub fall. (App 65a [27]).

treatment was the same. (App 174a [58]). Ms. Stevens also took RK with her to get formula from the Women, Infants & Children Program two or three times, and each time they measured his head and weighed him. (App 183a [97]).

From February 19 to 21, Ms. Stevens said RK behaved normally. (App 174a [59]). On the February 21, RK vomited after a bottle, but Ms. Stevens' first thought was that it was the flu. (App 174a [59]). She worked at a pharmacy and people told her it had been going around. (App 174a [59]). RK continued to vomit that afternoon, so Ms. Stevens made him a bottle of peppermint water, which he drank and kept down. (App 174a [59-60]). RK took and tolerated another bottle of peppermint water before going to bed and he slept through the night. (App 174a [60]). Dr. Dawis had recommended peppermint water for Ella when she was a baby; it worked then and Ms. Stevens followed the advice again. (App 179a [79]).

Around about 8:30 or 9:00 a.m. the morning of Sunday, February 22, Ms. Stevens heard RK whimpering. (App 175a [62]). She went to check on him and his arm was twitching. (App 175a [62]). The twitching continued and she and Mr. Krukowski decided to take RK to the hospital. (App 175a, 203a [63, 176]). It was 7 to 10 minutes from when they noticed twitching until they left for the hospital. (App 202a [172]). Ms. Stevens told hospital staff she thought RK was having seizures and they took him back right away. (App 181a [88]).

Medical Testimony

At trial, the medical experts, treating physicians, and treating nurses all agreed that RK did not have any outward signs of trauma to his head, chest, or

abdomen, nor were there bruises or abrasions. (App 37a [191]; App 73a [58-59]; App 183a [95]). RK's eyes appeared fine. (App 204a [178]). RK's heart rate, respiratory rate, and temperature were normal, there were no visible signs of distress such as chest pounding, and he was fully oxygenated. (App 40a [201-202]; App 78a [77-78]). There was nothing in the white part of RK's eyes that would indicate trauma. (App 78a [80]). RK's neck was normal, his chest sounded fine, and there was no distension in his abdomen. (App 79a [81-82]).

Hospital staff administered Ativan intravenously to stop the seizures. (App 157a [64]). During that procedure, Ms. Stevens and Mr. Krukowski saw staff bend RK's hand back dramatically to insert the IV needle. (App 181a, 204a [89, 181]). Then RK's heart rate dropped dramatically. (App 182a [91]). RK had a "glazed" look in his eyes. (App 182a [91]).

Because of RK's seizures, the ER doctor suspected low sodium or an electrolyte abnormality. (App 73a [59]). The lab tests ruled this out so she next suspected trauma or bleeding in the brain and ordered a CT and an MRI. (App 73a-74a [60-63]). Those tests revealed bleeding and she suspected non-accidental trauma. (App 75a [65, 67-68]).

Ms. Stevens stayed with RK while he was given and MRI. (App 176a [67]). Shortly thereafter the doctors took RK for x-rays, and the detectives arrived and separated Ms. Stevens and Mr. Krukowski for interrogation. (App 176a [67-68]).

Dr. Gerard Farrar, a radiologist, read RK's MRIs (App 83a [97]). Dr. Farrar saw a subdural hygroma (evidence of an old bleed) and acute blood (evidence of a

more recent bleed). (App 83a [98-99]). Dr. Farrar testified the old bleed might have been a couple of weeks old and the new bleed a day or two old. (App 83a [100]). He speculated the injuries could have been caused by a bathtub fall or by being shaken. (App 85a [105-106]).

Ophthalmologist Dr. Majed Sahouri examined the back of RK's eyes. (App 43a [215]). Dr. Sahouri observed numerous hemorrhages, which he characterized as non-accidental. (App 44a [220]). He opined that hemorrhages of this kind were caused by "shaking" and could not be caused by blunt force trauma. (App 44a [220]).

Dr. Frank Schinco, a neurological surgeon, also treated RK. (App 151a [134]). Dr. Schinco testified that with the combination of hematomas and retinal hemorrhages, "it would indicate a very significant probability and likelihood that the child had been shaken in a typical manner." (App 152a [139]). Dr. Schinco ultimately inserted a catheter into RK's skull to relieve pressure on the brain. (App 154a [146]). The catheter drained 10 ounces of fluid from RK's skull. (App 154a [148]).

Dr. Kristin Constantino, a radiologist, interpreted RK's skeletal survey, a series of x-rays of every bone in the body. (App 103a [179]). The x-rays were taken March 1. (App 108a [200]). The survey was not done as a part of RK's initial treatment, but triggered because of suspected non-accidental trauma. (App 103a [180]). Dr. Constantino found evidence of a facture in RK's skull, a fracture in his forearm, and healing fractures in his ribs. (App 104a, 106a, 108a [184, 192, 197-198]). Dr. Constantino concluded the skull fracture could have been caused by a bathtub fall. (App 112a [214-215]).

Although RK's stay at the hospital was a difficult one, he fully recovered. (App 132a-133a [44-45]). RK was discharged March 3, 2015. (App 133a [45]).

Opening and Closing Arguments[2]

Charges of child abuse were filed against Mr. Krukowski and Ms. Stevens. At trial, the prosecution opened by saying it would not prove Mr. Krukowski or Ms. Stevens had intentionally harmed RK because if the prosecutor "could show an intentional act by one or both of them, the criminal charge would be a higher degree." (App 5b [175]). What the prosecutor intended to prove was that the parents "failed or omitted to provide the necessary medical treatment in a timely way." (App 5b [175-176]).

During closing argument, the prosecution made similar arguments to the jury. (App 16b-17b, 39b-40b, 73b-74b). The prosecutor argued the jury should find Mr. Krukowski guilty of second-degree child abuse because he "failed to do what the law says he must do to care for his child." (App 74b).

> We don't know who caused that injury because the people don't have to prove that because this isn't first-degree. It's the failure to act and take care of your child after some injury has occurred, when there are obvious signs of distress. (App 73b).

Verdict and Sentencing

[2] The prosecution did not include the opening and closing arguments in their appendix. Mr. Krukowski has included these transcripts in his appendix for this Court's review because how the case was argued and presented to the jury is essential to the determination of the issues on appeal.

The jury found Mr. Krukowski guilty of second degree child abuse. Ms. Stevens' jury also found her guilty of second degree child abuse. Mr. Krukowski was sentenced to 3 to 10 years in prison.

Appellate Proceedings

On appeal, Mr. Krukowski argued his conviction must be vacated because the evidence, at best, demonstrated a failure to immediately take his child to the hospital after the fall. In particular, he argued this evidence was insufficient to establish his guilt for second-degree child abuse because MCL 750.136b does not criminalize a failure to timely seek professional medical attention.[3]

On August 1, 2019, the Court of Appeals issued an opinion vacating Mr. Krukowski's and Ms. Stevens' convictions and sentences and directing the trial court to enter judgments of acquittal. (App 27a-34a). The court held that "[u]nder the factual circumstances in this case, and based on the theories presented, the prosecutor failed to present sufficient evidence under which to convict defendants of second-degree child abuse." (App 33a-34a). The court also concluded the evidence presented was insufficient to establish the alleged use of home remedies either harmed or were likely to harm RK. (App 32a). Instead, the court concluded the only "causative factor" alleged by the prosecutor was the failure to seek professional medical treatment – an omission not proscribed by statute. (App 32a-34a).

[3] Mr. Krukowski also raised other claims in the Court of Appeals alleging ineffective assistance of counsel. Those issues were not addressed by the Court of Appeals opinion and are not part of this Court's order granting argument on the application.

On March 6, 2020, this Court ordered supplemental briefing addressing (1) whether there is sufficient evidence for a rational juror to conclude beyond a reasonable doubt that defendants committed the offense of second-degree child abuse, MCL 750.136b(3)(a) and MCL 750.136b(3)(b); and (2) whether the phrase "willful abandonment" in MCL 750.136b(1)(c) encompasses a parent's failure to timely seek professional medical care for his or her child.

Supplemental Summary of the Argument

Mr. Krukowski asks this Court to deny the prosecutor's application for leave to appeal because the evidence is insufficient to sustain his conviction for second-degree child abuse. This is so for at least four reasons.

First, the Court of Appeals summarized the prosecutor's theory at trial: "It is overwhelmingly clear that the causative factor as alleged by the prosecutor was the *failure to seek professional medical treatment*." (App 32a) (emphasis in original). But, this omission is not criminalized by any section of the second-degree child abuse statute. Now, the prosecution seeks to recast what occurred as a criminal "act" by shifting focus to what Mr. Krukowski and Ms. Stevens did—giving the child some peppermint water and putting frozen peas on his head—instead of taking their child to a doctor. However, it remains true that this case is about what the parents failed to do. It's also true that the Legislature, by its plain language, did not intend to impose criminal liability in this scenario. Adopting the prosecutor's interpretation would vastly expand the scope of the second-degree child abuse statute by eliminating the distinction between acts and omissions, a distinction the Legislature explicitly included in the statute.

Second, the phrase "willful abandonment," which is part of the definition of "omission" in the statute, does not encompass a parent's failure to timely seek professional medical treatment. On appeal, the prosecution seeks to redefine the term willful abandonment and transform it into a sweeping catch-all provision, where conceivably all omissions fall within the scope of the second-degree child abuse

statute. Such a definition is out of step with the ordinary definition of abandonment, principles of statutory construction, and the realities of parenting. It too would greatly expand the scope of the statute by criminalizing conduct the Legislature expressly did not intend to proscribe.

Third, even if this Court concludes an "act" occurred, the prosecution failed to prove Mr. Krukowski's guilt because there is insufficient evidence he possessed the mens rea to commit the offense. The prosecution's inadequate home remedy theory fails to establish Mr. Krukowski or Ms. Stevens used these remedies either knowing or intending they were likely to cause serious physical harm or that they were consciously disregarding a substantial and unjustifiable risk that such harm would result from these remedies. Further, under a reckless act theory, these home remedies are also inadequate because there is no evidence RK was actually harmed by them.

Fourth, and finally, the prosecution cannot rely on Ms. Stevens' alleged act of lying to medical professionals or following medical advice and obtaining chiropractic care to establish Mr. Krukowski's guilt because these theories were never argued at trial and, as the prosecutor acknowledges in their supplemental brief, the jury was only instructed on the "inadequate home remedy." The prosecutor cannot introduce a new theory of guilt on appeal.

This Court should deny leave to appeal.

I. There is insufficient evidence that Mr. Krukowski committed second-degree child abuse. Failing to immediately take his child to the doctor after a fall and instead choosing to give his child some water does not constitute an omission as defined by the statute, willful abandonment, a reckless act, or an intentional/knowing act.

Issue Preservation

An insufficient-evidence claim is reviewable on appeal even when not raised below. *People v Patterson,* 428 Mich 502, 514 (1987).

Standard of Review

This Court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that Mr. Krukowski's guilt was proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307 (1980); *People v Wolfe*, 440 Mich 508, 515 (1992); *People v Hampton*, 407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson*, 443 US at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v Patterson*, 428 Mich 502, 525 (1987) (quoting *Winship*, 397 US at 364).

The interpretation and application of statutes is a question of law and is reviewed de novo. *People v Babcock*, 469 Mich 247, 253 (2003). A court's primary

purpose in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams,* 475 Mich 245, 250 (2006). The most relevant starting point for discerning legislative intent lies in the plain language of the statute. *Id.* "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Frank v Linkner*, 500 Mich 133, 143 (2017) (citations and quotation marks omitted). If the Legislature uses clear and unambiguous language, courts must enforce the statute as written. *People v Barbee,* 470 Mich 283, 286 (2004).

Argument

Dane Krukowski was convicted of second-degree child abuse because he allegedly failed to take RK to the doctor in a timely manner after RK slipped and fell in the bathtub. This omission is not covered under any provision of the second-degree child abuse statute. In an attempt to attempt to make this alleged conduct fit within the statutory language, the prosecution recast Mr. Krukowski's and Ms. Stevens' failure to act as the act of providing an "inadequate home remedy," namely giving RK peppermint water. Regardless of whether this conduct is considered an act or an omission, it does not fall within the scope of MCL 750.136b(3)(a) or MCL 750.136b(3)(b).

The second degree child abuse statute, MCL 750.136b(3), has three subsections.[4] Each criminalizes different forms of child abuse. At issue here are sections (3)(a) and (3)(b), which allow for a conviction of second-degree child abuse if:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

According to MCL 750.136b(1)(c), "omission" means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child."

Each section involves serious physical or mental harm to a child. Subsection (3)(a), which criminalizes omissions and reckless acts, requires that the alleged omission or reckless act actually cause serious physical or mental harm. Subsections (3)(b) criminalizes actions "likely to cause serious physical or mental harm[5] to a child regardless of whether harm results."

Contrary to the prosecution's argument, this statutory scheme is not complex. The statute provides clear guidance on the types of conduct that fall within its scope. Any ambiguity in the scope of the statute is the result of overzealous prosecutors who seek the expand the scope beyond what the Legislature ever intended, just to fit circumstances the prosecutors believe require criminal punishment. The prosecutor's

[4] The prosecution never charged Mr. Krukowski with violating subsection (3)(c), the jury was never instructed on this theory, and the prosecutor does not argue he is guilty of violating this subsection on appeal.
[5] The prosecution did not argue Mr. Krukowski's failure to seek professional medical treatment caused serious mental harm, defined in MCL 750.136b(1)(g).

arguments in its brief to this Court show the legal and verbal gymnastics necessary to argue that Mr. Krukowski is guilty of second-degree child abuse—the proverbial square peg into a round hole. These attempts to overreach and expand criminal liability must be rejected.

A. The evidence presented at trial establishes that Mr. Krukowski chose not to immediately take his child to the doctor after an accidental fall in the bathtub. This choice is not proscribed by any provision of the second-degree child abuse statute.

The prosecution's theory at trial was that Mr. Krukowski's failed to provide medical treatment for his child by not immediately taking him to the doctor. In other words, the prosecution was based on an omission. In his opening statement, the prosecutor conceded he could not prove any intentional act by Mr. Krukowski. Instead, he argued it was Mr. Krukowski's failure "to provide the necessary medical treatment in a timely way" that established his guilt:

> If the evidence, in this case, could show an intentional act by one or both of them, the criminal charge would be a higher degree.
>
> . . .
>
> What will be proven, in this case, however, is that no matter how these injuries occurred, they – they, as parents – **failed** or **omitted** to provide the necessary medical treatment in a timely way that would alleviate this child's pain and suffering, prevent worsening of the symptoms in these injuries, and minimize the very real possibility the baby could have died of those injuries, imminently, they finally took the baby, on the 22nd. [(App 5b [175]) (emphasis added)].
>
> I use the word omitted. There are wrongs of commission and omission; and in this case you will hear more about the latter. Omitting to do things. Abandoning the child. . . . You created the child, and you don't take action. [(App 5b [176])].

The prosecutor's closing argument was more of the same. It was full of references to Mr. Krukowski's and Ms. Stevens' failure to immediately seek medical attention and the act of using the home remedy of ice and water:

- Willful abandonment theory: Mr. "Krukowski abandoned his responsibility as a parent. He had a duty to provide help to that baby . . . ." (App 17b).

- Reckless act theory: "[I]t was a reckless act, to doctor the baby and to put the cold cloth on him and the ice bag or pea bag, and we think that's a reckless act." (App 17b).

- Intentional act theory: "[T]hey did something intentionally. They decided to use their medical knowledge and procedures at home and play doctor, and the heck with what Shawn Stevens said, who said take him in, right then, when . . . Codie and Dane called." (App 17b).

- "Why didn't she take this baby? Why didn't Dane take this baby?" (App 36b-37b).

- "Now it's on Sunday, she has another chance to be a good mom and for Dane to be a good dad. Nope. And then the vomiting episodes happen. Another chance, another indication, a separate reason you need to get the baby in . . . . Let's just try these home remedies, a little peppermint water. Watch the baby." (App 38b).

- "These are all issues that you can spend time in the jury room fighting about, but you should be focused on the major issue. Did they have a duty to act a certain way, and did they fail to do that?" (App 39b).

- "It breaks my heart that I can't make it easy for you and say Dane did it, or Cody did it, or they both did it. That's not your job. Did they fail to take action when they should have?" (App 40b).

- "This is not a case of intentionally caused harm." (App 67b).

- "On the 8th, if it wasn't apparent on the 7th, it was apparent on the 8th. Still took no action, even though a baby can be in distress." (App 71b).

- "We don't know who caused that injury because the people don't have to prove that because this isn't first-degree. It's the failure to act and take

care of your child after some injury occurred, when there are obvious signs of distress." (App 73b).

- "The defendant Dane Krukowski has an equal obligation, along with Codie Stevens, to get the baby the help it needs." (App 73b).

- "On his own, Dane Kruskowski has failed to do what the law says he must do to care for his child. He and Codie are the only ones who have that obligation. They both failed. He failed too." (App 74b).

This theory, and the evidence presented to support it, is insufficient to support Mr. Krukowski's conviction for second-degree child abuse because a failure to provide medical treatment is not an omission under MCL 750.136b(1)(c).

Failing to act is, by definition, an omission. Black's Law Dictionary (10th ed)[6] provides the following definition of omission:

> 1. A failure to do something; esp., a neglect of duty <the complaint alleged that the driver had committed various negligent acts and omissions>. 2. The act of leaving something out <the contractor's omission of the sales price rendered the contract void>. 3. The state of having been left out or of not having been done <his omission from the roster caused no harm>. 4. Something that is left out, left undone, or otherwise neglected <the many omissions from the list were unintentional>.

This definition falls directly in line with the prosecution's theory at trial: Mr. Krukowski failed to perform—or neglected his "duty"—as a parent when he failed to seek timely professional medical treatment for his child. His lack of certain conduct is an omission. The Court of Appeals acknowledged the prosecutor's theory was one of omission: "It is overwhelmingly clear that the causative factor as alleged by the prosecutor was the *failure to seek professional medical treatment*." (App 32a)

[6] In the absence of a statutory definition, this Court regularly consults dictionary definitions. See *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312 (2002).

(emphasis in original). And, "*inaction* cannot be equated with an 'act' for purposes of the child-abuse statute." (App 32a) (emphasis in original). The Court of Appeals has acknowledged this before in the context of the second-degree child abuse statute: "failing to take an action does not constitute an act." *People v Murphy*, 321 Mich App 355, 361 (2017).

The second-degree child abuse statute specifically recognizes a difference between acts and omissions and limits the types of omissions that are criminalized. Because of this specificity, a prosecutor cannot blur the line between acts and omissions to attempt to impose criminal liability. As a result, MCL 750.10, which eliminated the distinction between acts and omissions in the penal code, does not apply or change this analysis because it is a well-settled matter of statutory construction that when a conflict exists between two statutes, the one that is more specific to the subject matter generally controls. *People v Hall*, 499 Mich 446, 458 (2016), citing *People v Buehler*, 477 Mich 18, 26 (2007).

Mr. Krukowski did not fail to provide food, clothing, or shelter to RK, nor did he willfully abandon him. See Part I.B, infra. Therefore, his omission—failing to immediately seek medical care—is not criminalized under this statute.

B. As the Court of Appeals reasoned, the phrase willful abandonment does not include a parent's failure to timely seek professional medical care. Even if it did, there is no way to construe the facts of this case as a willful abandonment.

In addition to the failure to provide food, clothing, or shelter, an omission that is punishable as second-degree child abuse is the "willful abandonment of a child." MCL 750.136b(1)(c).

The Court of Appeals held it was "a stretch to equate the failure to seek medical care with the plain and ordinary meaning of the term 'abandonment.'"(App 33a). The court incorporated the dictionary definition of "abandon": "to give up with the intent of never again claiming a right or interest in; to withdraw protection, support, or help from." (App 33a) (quoting Merriam-Webster's Collegiate Dictionary (11th ed.)). The court then held that "[t]he failure to seek a certain type of medical care is not equivalent to withdrawing protection, help, or support from a child, or giving a child up with the intent never to claim an interest in the child." (App 33a).

Relying on the statutory construction rule providing that "the express mention of one thing implies the exclusion of another," the court noted that the Legislature defined "omission" to include the "willful failure to provide 'food, clothing, or shelter,' but does not mention the willful failure to provide medical care." (App 33a) (quoting *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 15 n 6 (2016)). And, if the court had accepted the prosecutor's theory that "abandonment" included the failure to seek timely medical care, that would mean "abandonment" would also include the failure to provide food, "because both of these failures would represent the shirking of parental duties." (App 33a). But that would render part of the statute surplusage, which courts should avoid. (App 33a); *People v Peltola*, 489 Mich 174, 181 (2011).

The Court of Appeals approach is correct. Definitions matter. The prosecutor provides this Court a definition of "willful" from its own precedent: "a willful act is one that is taken with the intent to do something specific." Supp Brief at 24, quoting *In re Estate of Erwin*, 503 Mich 1, 10-11 (2018). Mr. Krukowski agrees this is the proper definition.

As to the meaning of "abandonment," the prosecutor reads further into the dictionary definition and seeks to reinterpret the term to also mean abandonment occurs "when a person turns away from his or her existing course or duty, often in the face of dangerous or dire circumstances." Supp Brief at 26.

After posing this particular thematic interpretation of the dictionary definition of "abandonment," the prosecutor details this Court's previous definitions of "abandonment" in other statutory contexts. The prosecutor details, at length, that "abandonment," in these other contexts, has meant *permanent* or *perpetual* renouncement of duties over a child or a spouse, with the *intent* to do so. Supp Brief at 29-33. The plain language of the second-degree child abuse statute indicates a similar definition was the Legislature's intent.

The prosecutor works really hard to distinguish prior precedent and the dictionary definition used by the Court of Appeals to argue this Court should redefine "abandonment," but only in the second degree child abuse statute, to mean: "a parent's turning away from parental duty in the face of changed or unusual dangerous circumstances." Supp Brief at 29. This would turn willful abandonment into a sweeping catch-all provision in which conceivably all omissions would subject

parents—who make choices every day about how to care for the children—liable under the second-degree child abuse statute. This definition is not only out of step with the ordinary definition of abandonment, but it vastly expands the scope of the statute to criminalize conduct the Legislature expressly did not intend to cover. Such an interpretation would not provide adequate notice to people as to what conduct and parental decision-making could be criminalized.

The prosecutor also seeks to read more into the plain language of the statute, suggesting that what the Legislature really meant when it listed "food, clothing, and shelter" is that those three things are "necessities required as a regular part of a child's day-to-day life" and the "boundaries of the applicable category . . . [are] provisions needed to care for a child in the normal, day-to-day course of things." Supp Brief at 28. And, because RK's fall was not (in the prosecutor's view) a "normal" occurrence, his parents abdicated their duty "in changed dangerous circumstances" and therefore they willfully abandoned RK. Supp Brief at 28.

This is simply not the case, and it is another stretch by the prosecutor. Such an interpretation relies on a host of assumptions that do not fit with the plain language of the statute, common principles of statutory construction, or the daily reality of parenting.

Even giving credence to this "day-to-day interpretation," parents make countless medical decisions on a daily basis, including *when* to take a child to the doctor. The prosecutor is splitting hairs by saying the Court of Appeals may be right in its statutory construction if the parents had forgotten to give RK a daily

medication. Supp Brief at 28 n 24. But somehow, taking your child to the doctor two days after a fall—while watching him and providing home remedies—is not a day-to-day decision by a parent. To adopt the prosecutor's proposed definition would remove all parental discretion in matters of childcare. It would quite literally require parents to take their child to the hospital after any potential injury, or else face criminal liability.

Simply put, the Court of Appeals was correct in its interpretation of the statute. The Legislature easily could have defined omission as "a willful failure to provide food, clothing, **medical treatment**, or shelter necessary for a child's welfare." In fact, child neglect can include "harm or threatened harm to a child's health or welfare" through "[n]egligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care." MCL 722.622(k)(i). The Legislature chose to include the failure to provide medical care as possible child neglect and explicitly chose not to criminalize the failure to provide medical care. While there is no need to speculate on the motives of the Legislature because of the plain language of the statute, it could be possible that the Legislature chose not to criminalize the failure to provide medical care out of fear that it would criminalize parental discretion guided by religious beliefs. Because even though a failure could be child neglect, MCL 722.634 provides that "[a] parent or guardian legitimately practicing his religious beliefs who thereby do not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian." There was no

need for such an exception in the Penal Code because the Legislature chose not to criminalize the failure to provide medical care as second-degree child abuse.

The prosecutor takes great pains to find a definition of "abandon" that suits the facts of this case. That is simply not possible. Ms. Stevens' took RK to the doctor *two days* after the fall in the bathtub. Both parents watched him. They put a cold compress on the bump, which was not visible two days later. Two weeks after the fall, they provided peppermint water to a vomiting child who had been prone to vomiting. Their doctor recommended chiropractic care, which they did. Within minutes of observing possible seizures, they took RK to the ER. While in hindsight they may have made the wrong parenting call at some point in this timeline, never did Mr. Krukowski willfully abandon RK. He never had the intent to do the specific act of permanently renouncing his duties as RK's father.

C. Even if providing an "inadequate home remedy" of allegedly giving a child too much water is considered an act under the statute, this act fails to establish Mr. Krukowski's guilt because there is insufficient evidence he had the requisite mens rea under MCL 750.136b(3)(a) and MCL 750.136b(3)(b).

In closing argument, the prosecutor only briefly mentioned the inadequate home remedies that he was asserting were either reckless or intentional acts—using frozen peas as a cold compress and giving RK water. The prosecutor has since abandoned the theory that using cold peas on the head was a reckless or intentional act. Supp Brief at 15, n 12. There was **one** reference by the prosecutor to the water in opening and closing argument: "Something's going wrong, and they don't take the baby

in on the 21st. Let's just try these home remedies, a little peppermint water. Watch the baby." (App 38b).

For the first time in its brief to this Court, the prosecutor asserts that giving RK "multiple bottles of water in a short period of time following a known head injury" was the reckless/intentional act. Without citing to the record, the prosecutor told this Court that the prosecutor at trial "argued that defendant's act of giving the young infant multiple bottles of water was a home remedy that was likely to cause serious physical harm to the infant, regardless of whether harm resulted." Supp Brief at 15-16. The prosecutor did not make this argument at trial, but in passing referred **one time** to "a little peppermint water." And, the prosecutor did not raise this issue with the water in the brief to the Court of Appeals. Failure to brief an issue on appeal constitutes abandonment. *Mitcham v Detroit,* 355 Mich 182, 203 (1959).

Even if the prosecutor has not abandoned this issue, giving your child peppermint water **two weeks** after a fall in the bathtub does not rise to the level of second-degree child abuse. As the Court of Appeals correctly recognized, to establish liability for child-abuse second degree based on a reckless act or an intentional act, "the 'act' alleged must be the causative factor in causing serious harm, MCL 750.136b(3)(a), or in being likely to cause harm, MCL 750.136b(3)(b)." (App 32a). The alleged act was the use of home remedies—cold peas and peppermint water—but there were no allegations at trial that "these home remedies [are] what harmed the child or was likely to harm the child.". (App 32a). The court went further and stated that "as a matter of pure common sense, applying a cold compress to a child's head or giving a

child peppermint water is not likely to lead to seizures and severe swelling of the brain or otherwise lead to harm." (App 32a). The prosecutor asserts—again, for the first time here—that it is "generally understood that very young infants should not be given plain water." Supp Brief at 17. There are two problems with this assertion, besides that it was not argued at trial or in the Court of Appeals: (1) the prosecutor cites no authority to support this assertion; and (2) there is no evidence whatsoever that Mr. Krukowski knew or should have known this was *likely* to cause serious physical injury.

Reckless Act

Under MCL 750.136b(3)(a), any reckless act must actually cause serious physical harm. There is no evidence that giving RK peppermint water caused his injuries. In fact, while some medical professionals testified giving an infant water *could* cause harm, these same professionals testified that for RK, the water did not actually harm him.

Even if this water had directly caused RK's injuries, Mr. Krukowski did not have the requisite mens rea to be convicted of committing a reckless act. The trial court defined "reckless" as "having disregard of, or indifference to, consequences, under circumstances involving danger to the life or safety of others, although no harm was intended." (App 219a [143]). The child abuse statute provides no definition of reckless. Black's Law Dictionary (10th ed.), however, defines reckless as

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. • Reckless conduct is

> much more than mere negligence: it is a gross deviation from what a reasonable person would do.[7]

It appears Ms. Stevens chose to give RK peppermint water because the pediatrician had advised her to do the same for her older daughter when she was previously sick. This decision by Ms. Stevens—one in which Mr. Krukowski apparently acquiesced—cannot be said to have been in disregard or with indifference to consequences involving danger to the life or safety of others. Vomiting in children is fairly common. These parents chose to use a remedy that had been medically advised by a physician with a prior child. It's no different than parents choosing to provide Tylenol to reduce a child's fever or give Pedialyte after vomiting—common home remedies often administered without consulting a doctor, but based on the experience of being parents.

Intentional Act

Under MCL 750.136b(3)(b), a person must "knowingly or intentionally commit[] an act likely to cause seriously physical or mental harm to a child regardless of whether harm results." The statute does not provide a definition of knowing or

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[7] This definition is consistent with the definition in the Model Penal Code. Model Penal Code § 2.02(c) provides:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

In addition, Judge Gleicher concluded, in her concurring opinion in *People v Murphy*, 321 Mich App 355, 372 (2017)(Gleicher, J., concurring), that the Model Penal Code definition of reckless comports with Michigan law and should be adopted.

intentional acts. Black's Law Dictionary (10th ed) defines "act" as "1. Something done or performed, esp. voluntarily; a deed" or "2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world." Using this definition, in order to constitute a knowing or intentional act under the statute, an individual must do something and do it knowing or intending that the act will likely cause serious physical harm.

Just as Mr. Krukowski did not act recklessly, neither did he act knowingly or intentionally. There is no evidence whatsoever that he knew giving RK peppermint water would "likely . . . cause seriously physical . . . harm." It's ludicrous to think that following past medical advice and providing water to a child could rise to the level of second-degree child abuse. That a medical professional may understand the potential harm of a baby drinking too much water does not mean the average individual is deemed to understand these things. The Court of Appeals acknowledged so in relying on "common sense" that the act of providing peppermint water could not have led to these injuries. (App 32a). Nor was there any evidence that providing water to RK was *likely* to cause serious physical harm.

In contrast, the Court of Appeals determined that an example of affirmative acts—considered both reckless and knowing/intentional—that could impose criminal liability under the second-degree child abuse statute was storing "a loaded, illegal, short-barreled shotgun in a readily accessible location where he allowed his young children to play while unsupervised," and a child subsequently dying from a gunshot

wound to the head. *People v Head*, 323 Mich App 526, 536 (2018). These acts are wholly distinct from giving a child peppermint water to soothe an upset stomach.

The prosecutor makes the absurd argument that at trial, "the prosecutor did not need to show that the parents intended harmful consequences to flow from their actions, only that the act itself was intentional." Supp Brief at 16-17. That is, the prosecutor would like this Court to essentially hold that the act itself that maybe could cause some harm is enough to make a parent guilty of second-degree child abuse. This make no sense and reads out of the statute the requirement that "serious physical or mental harm" must be "likely" and that the parent or caregiver knew or intended that likely harm. If this Court adopts the prosecutor's argument that the act alone is sufficient, any parent could be charged under this statute for making the wrong parenting call. Every day parents are challenged to make big and small medical decisions for their child, and not all require a consultation with a physician:

- How much Tylenol do I give my child? When can I give my child Advil?
- Should I breastfeed or formula feed? Which formula? What if it's not organic?
- Should I sleep my infant in a swaddle? What about co-sleeping?
- Which bruise on my toddler should I have seen by a doctor?
- Should I give my child Benadryl for a food allergy or call the doctor?
- Should I send my child to school for face-to-face instruction during a global pandemic?

The Legislature gave clear instructions about what rises to the level of second-degree child abuse. The prosecutor here attempts to criminalize one possibly

inadvisable decision—providing RK water—that any parent could have made. Being a parent comes with the ability to exercise discretion which can ultimately lead to mistakes being made. Using the prosecutor's approach here, many well-meaning parents may be prosecuted for simple mistakes. This was not the intent of the Legislature and is why the statute was drafted with plain, clear language.

D. The prosecution cannot rely on Ms. Stevens allegedly lying to medical professionals about the existence of a fall or that it was wrong to seek chiropractic care because the theory was never presented at trial and the jury was only instructed to consider inadequate home remedies.

In its brief to the Court of Appeals, the prosecutor argued for the first time that it was a reckless act that Ms. Stevens supposedly lied[8] to the doctor by not reporting that RK had fallen in the bathtub. This was not presented to the jury as a theory of prosecution. And, in its brief to this Court, the prosecutor alleged for the first time that seeking chiropractic care for RK was also a reckless act. Supp Brief at 22. It, too, was never presented to the jury as a theory of prosecution. The prosecutor complains to this Court that the "Court of Appeals did not discuss these acts or explain why there were insufficient to support Stevens's conviction." Supp Brief at 23.

There was no need for the Court of Appeals to mention these acts because by failing to mention it at trial, the prosecutor waived these theories. The jury was instructed that the "acts" in question were the "inadequate home remedies." (App 219a-220a [143-147]). In presenting an issue for appellate review, "a party is bound to the theory on which the cause was prosecuted or defended in the court below."

[8] Ms. Stevens testified that she told the doctor about the fall.

People v McGraw, 484 Mich 120, 131 n 36 (2009) (citation and quotation marks omitted).[9] Absent exceptional circumstances, appellate review is limited to issues raised before and decided by the trial court. *Id.*[10] Having failed to raise the "lying as a reckless act" theory or "chiropractic care as a reckless act" theory in the trial court, the prosecutor waived those arguments and cannot raise them for the first time on appeal. *Id.*; see also *Napier v Jacobs*, 429 Mich 222, 227 (1987) ("[A] failure to timely raise an issue waives review of that issue on appeal."). The prosecutor's splitting of hairs to this Court as to the jury instructions are yet another attempt to grasp at straws to save a conviction for which there simply was no evidence. See Supp Brief at 23 n 18.

The "raise-or waive" rule is supported by many rationales. First, it is rooted in a fairness principle—that a litigant should advance his arguments at "a time when there is an opportunity to respond to them factually, if his opponent chooses to." *Napier*, 429 Mich at 228 (citing 3 LaFave & Israel, Criminal Procedure, § 26.5(c), pp 251-252); see also *Giordenello v United States*, 357 US 480, 488 (1958). Second, it is rooted in an accountability rationale by avoiding the "untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful." *Walters v Nadell*, 481 Mich 377, 388 (2008). In other words, a litigant,

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[9] Citing *Gross v Gen. Motors Corp.,* 448 Mich 147, 162 n 8, (1995); *Dwelley v Tom McDonnell, Inc.,* 334 Mich 229, 233 (1952).

[10] See, e.g., *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund, Inc.*, 527 US 308, 319 n 3, (1999) ("Because [petitioner's] argument was neither raised nor considered below, we decline to consider it."); *Taylor v Lowe*, 361 Mich 282, 284 (1964) ("counsel may not stand by, electing as we must assume to take his chances on the verdict [] and then raise questions which could and should have been raised [at trial]").

sensing their demise, cannot use the appellate process as a parachute to soften the landing. Third, it is rooted in judicial economy: "if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of appeal." *Napier,* 429 Mich at 229 (citing LaFave & Israel).

Here, there are no exceptional circumstances that would justify consideration of alternate theories for the first time on appeal. See *Napier*, 429 Mich at 232-233 (review of a waived issue is only appropriate to prevent a miscarriage of justice, and the power of a court to review an unpreserved issue is to be exercised quite sparingly). The facts on which the prosecutor would rely to further the theory that lying to a doctor is a reckless act or that taking an infant for chiropractic care were fully known to them at the time of trial. The prosecution cannot save its conviction based on arguments it intentionally chose not to pursue at trial.[11]

[11] And even if the prosecutor had not waived those theories, both would still be subject to the same mens rea problems as are present with the peppermint water. See Part I.C., *supra*.

Summary and Relief

WHEREFORE, for the foregoing reasons, Dane Richard Krukowski asks that this Honorable Court deny the application for leave to appeal.

Respectfully submitted,

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